

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5310

April 17, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
Attention Docket ID No. EPA-HQ-OAR-2018-0794
EPA Docket Center, U.S. EPA, Mailcode: 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: National Emission Standards for Hazardous Air Pollutants: Coal-and Oil-Fired Electric Utility Steam Generating Units –Reconsideration of Supplemental Finding and Residual Risk and Technology Review, Proposed Rule, Docket ID No. EPA-HQ-OAR-2018-0794; FRL-9988-93-OAR, 84 Fed. Reg. 2,670 (Feb. 7, 2019)

Dear Administrator Wheeler:

The U.S. Chamber of Commerce (“the Chamber”) appreciates the opportunity to comment on the U.S. Environmental Protection Agency’s (“EPA”) proposed reconsideration of its response to the U.S. Supreme Court’s decision in *Michigan v. Environmental Protection Agency*.¹ The proposal addresses EPA’s consideration of cost in its 2012 and 2016 determinations that regulation under section 112 of the Clean Air Act (“CAA”) of hazardous air pollutant (“HAP”) emissions from coal- and oil-fired electric utility steam generating units (“EGUs”) was “appropriate and necessary.”²

¹ 576 U.S. ____ (2015), 135 S. Ct. 2,699 (“*Michigan v. EPA*”).

² See 42 U.S.C. § 7412(n)(1)(A).

These comments urge EPA to sustain the current rule governing EGU emissions under CAA § 112, complete the Residual Risk and Technology Review (“RTR”) rulemaking,³ and engage in a broader effort to prospectively correct the cost-benefit analyses used for EPA decision-making.

INTRODUCTION

The Chamber represents the leading energy and manufacturing sectors that form the backbone of our Nation’s industrial ability to grow the economy and provide jobs in an environmentally sustainable and energy-efficient manner. The Chamber represents members that both generate and rely on the generation of electricity, and thus has a compelling interest in how EPA may regulate environmental aspects of electricity production.

The National Emission Standards for Hazardous Air Pollutants (“NESHAP”) for coal- and oil-fired electric generating units,⁴ commonly known as the Mercury and Air Toxics Standards (“MATS Rule”), are among the most expensive regulations for power plants to date. The effects of the Rule have been felt by power producers, consumers, and industrial consumers of electricity who, as the largest consumers of electricity, bear a significant part of the costs of major regulations, such as the MATS Rule. The Chamber has a keen interest in assuring that sound cost-benefit analyses play a significant role in any agency’s decision to impose or revise

³ The Residual Risk and Technology review is part of a statutorily required process to determine whether additional standards are needed to address remaining risk associated with HAPs after standards have been implemented, and to evaluate new technologies. *See* 42 U.S.C. §7412(f)(2),(d)(6). The proposal includes proposed findings to address these requirements.

⁴ National Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9,304 (Feb. 16, 2012) (codified at 40 C.F.R. pts. 60 and 63).

regulations, particularly those that have a broad impact on the American economy. As such, we welcome the opportunity to comment on the current proposal.

Despite fundamental errors underlying the prior appropriate and necessary determinations, the Chamber urges EPA to sustain the MATS rule, complete its RTR rulemaking, and engage in a broader effort to prospectively correct the cost-benefit analyses used for EPA decision-making. These comments also provide recommendations for improving upon the cost-benefit analysis discussed in the proposal.

I. Despite the Fundamental Errors Underlying the Prior “Appropriate and Necessary” Determination, EPA Should Sustain the MATS Rule.

EPA may only regulate HAP emissions from EGUs if it first determines it is “appropriate and necessary” to do so.⁵ *Michigan v. EPA* clarified that EPA must consider costs when making that determination.⁶ Indeed, that case involved EPA’s refusal to consider costs before implementing MATS, despite the grave disparity between the estimated costs and benefits. In 2012, EPA reaffirmed an “appropriate and necessary” finding that it had made in 2000, but withdrawn in 2005, and promulgated the MATS rule.⁷ In doing so, the agency refused to consider costs as part of its evaluation of whether regulation was appropriate and necessary,

⁵ 42 U.S.C. § 7412(n)(1)(A). Indeed, the CAA treats EGUs differently than other sources subject to the Act. Through Section 112, Congress demonstrated a clear interest in ensuring regulation of HAPs from industrial sources. However, Congress required EPA to undertake careful consideration and make certain findings before regulating EGUs under Section 112. *Id.* This is, in part, because EGUs are already subject to numerous regulatory requirements and additional regulatory burdens create energy-reliability and cost concerns that have implications for all sectors of the economy. As such, before regulating EGUs, EPA was first required to study “the hazards to public health reasonably anticipated to occur as a result of [EGU HAP emissions] after imposition of the requirements” of the Act. *Id.* EPA then was to report the study’s results to Congress along with the alternative control strategies for emissions “which may warrant regulation” under Section 112. *Id.* “[A]fter considering the results of the study,” EPA was to regulate EGUs under Section 112 only if it found “such regulation is appropriate and necessary.” *Id.*

⁶ See *Michigan v. EPA*, supra note 1.

⁷ See supra note 4.

contending that costs were irrelevant to that determination. This was particularly astounding because EPA’s costs estimate for the MATS rule (which the agency developed for other purposes), dwarfed the estimated benefits of reducing mercury and other HAP emissions from EGUs. EPA estimated MATS would cost \$9.6 billion per year in direct compliance costs, while the quantifiable benefits from reducing mercury and other HAPs—the actual targeted pollutants—were only between \$4 and \$6 million per year.⁸ The Supreme Court disagreed with EPA’s evaluation of the relevance of cost, holding “[t]he Agency must consider cost—including, most importantly, the costs of compliance—before deciding whether regulation is appropriate and necessary.”⁹

The proposal stems from the remand that resulted from *Michigan v. EPA*. In 2016, EPA finalized a supplemental finding concluding that its consideration of costs did not change its previous determination.¹⁰ State and industry groups challenged the supplemental finding in the D.C. Circuit.¹¹ However, the court has held the case in abeyance based on the Agency’s request to reevaluate its prior supplemental finding.¹² EPA now proposes to conclude that the supplemental finding was flawed and that “after considering the cost of compliance relative to

⁸ *Id.* at 9,306. After considering ancillary benefits that had nothing to do with reducing mercury or HAPs, EPA increased its estimate of quantifiable benefits to \$37 to \$90 billion per year.

⁹ *Michigan v. EPA*, 576 U.S. at 2,711 (2015).

¹⁰ See Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 81 Fed. Reg. 24,419 (Apr. 25, 2016).

¹¹ *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. filed April 25, 2016).

¹² See 84 Fed. Reg. at 2,674.

the HAP benefits of MATS, it is not appropriate and necessary to regulate [EGUs] under section 112 of the CAA.”¹³

The proposal includes many improvements to the analysis of costs and benefits that underpinned the supplemental finding and EPA’s previous appropriate and necessary determination. Unfortunately, however, the proposal is not drafted on a clean slate. Despite years of litigation over the 2012 MATS rule, no court stayed the effective date of that rule, which required initial compliance by April 16, 2015.¹⁴ The Supreme Court’s invalidation of the rule did not occur until June 29, 2015, resulting in the unusual circumstance whereupon regulated entities were forced to invest major resources into compliance or make irreversible plant retirement decisions before the judicial system could complete its review. In fact, an examination by the Chamber revealed that approximately 163 EGUs across the country were shuttered, in part, due to the MATS rule’s compliance requirements.¹⁵ Meanwhile, the power sector has spent approximately \$18 billion on compliance controls to date.¹⁶ Moreover, the shuttered plants, replacement power, and other capital expenditures for MATS compliance have been built into long term business plans, power markets, and compliance strategies for other regulatory requirements.

¹³ *Id.*

¹⁴ *See* 77 Fed. Reg. at 9,465.

¹⁵ Heath Knakmuhs, *Two Wrongs Make a Blackout*, U.S. CHAMBER OF COMMERCE GLOBAL ENERGY INSTITUTE (Nov. 12, 2015), available at <https://www.globalenergyinstitute.org/two-wrongs-make-blackout>.

¹⁶ This spending figure includes capital costs on installed equipment and also an estimate of continuing O&M associated with this new equipment. The amount does not include units that retired before the compliance date. The true economic cost of the rule includes the sum of these compliance costs plus the cost of early capital retirements of generating units that still had remaining useful years of life.

Clearly, EPA's rulemaking process should be prospectively adjusted to ensure that future determinations of whether regulations or regulatory changes are appropriate and/or necessary, whether under an explicit statutory requirement or an aspect of sound decision-making, account for the costs of regulation. However, any effort to rescind the MATS Rule at this juncture would quite simply be the regulatory equivalent to closing the barn door after the horse has long since left. In fact, rescission of the MATS Rule has the potential to adversely impact those entities that relied upon legally binding Clean Air Act regulations to guide their investment and retirement decisions.

While the proposal does not purport to revoke the MATS rule, revoking the appropriate and necessary finding creates a risk of leading to that ultimate outcome. After all, the Act could not be any clearer that such a finding is a prerequisite to regulating EGUs under Section 112.¹⁷ To be sure, EPA has pointed out that the D.C. Circuit held in *New Jersey v. EPA* that once a source category, like EGUs, is listed for regulation under Section 112, the category may not be de-listed unless the agency makes certain findings under Section 112(c)(9).¹⁸ Here, EPA has asserted it has no intention of making those findings.¹⁹ Nevertheless, as EPA has acknowledged, there are alternative interpretations of the *New Jersey* decision that litigants may pursue as a basis for challenging the validity of MATS following the finalization of the proposal.²⁰

¹⁷ 42 U.S.C. § 7412(n)(1)(A).

¹⁸ 84 Fed. Reg. at 2,678 (citing *New Jersey v. EPA*, 517 F.3d 574 (2008)).

¹⁹ *Id.*

²⁰ *See id.* at 2,679.

Regardless of the validity of those arguments, and with all due respect for the integrity the Agency has demonstrated through its evaluation of the heavily flawed appropriate and necessary determination, the Chamber recognizes the unique practical reality that the negative implications resulting from the faulty MATS regulation have already occurred, and are largely irreversible. As such, the Chamber prefers the certainty provided by maintaining MATS and moving forward on a parallel track to correct EPA's future evaluation of costs. Again, EGUs have spent more than \$18 billion to comply with MATS, retired assets, invested in new, replacement generation, and made major reductions in mercury and other pollutants.²¹ Given this investment and the industry's full implementation of the MATS requirements, regulatory and business certainty regarding the Section 112 standards is critical. As such, we recommend EPA sustain the MATS rule, complete the RTR, and separately pursue a regulatory process regarding the considerations of costs and benefits analysis under the CAA.

II. EPA Should Create a Clear and Consistent Framework for Evaluating Co-Benefits.

Among the major flaws in EPA's appropriate and necessary finding was its egregious treatment of incidental or "co-benefits." In 2012, and again in the supplemental finding, EPA relied on incidental PM_{2.5} benefits, referred to as co-benefits by the agency, as the primary justification for the MATS Rule. Incidental benefits arise when a regulation that is intended to produce one result under an authorizing statute also produces a beneficial ancillary result as a side effect of the intervention. Circular A-4, issued by the Office of Management and Budget ("OMB") clearly advises agencies to include these incidental benefits in the cost-benefit calculus

²¹ *Supra* note 16.

required by Executive Order (“E.O.”) 12,866.²² However, EPA has in the past misused incidental benefits by crafting regulations driven more by incidental benefits than to accomplish the statutorily authorized regulatory mission. That was the case with the 2012 MATS Rule.

The proposal addresses the EPA’s use of cost-benefit analysis in the 2012 rule in accord with *Michigan v. EPA*. The Chamber applauds EPA for recognizing that the agency’s past over-reliance on incidental benefits as blanket justification for unrelated regulation is wrongful and for addressing the issue in the context of the MATS rule in this proposed rulemaking.

While the 2012 MATS Rule is surely the most egregious example of EPA’s misuse of incidental benefits, it is far from the only example of this practice. Indeed, from 2009 through 2016 in particular, EPA relied on PM2.5 incidental benefits to justify almost every major air regulation the agency promulgated. While the current proposal rightly addresses the use of incidental benefits within the context of re-evaluating the Agency’s “appropriate and necessary” determination under CAA Section 112(n)(1)(A), EPA should end the inappropriate use of incidental benefits across all statutory provisions of the CAA. To this end, the Chamber urges EPA to produce a clear, consistent, and prospectively-applicable framework for the appropriate consideration of incidental benefits as an integral part of the agency’s rulemaking entitled “Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process.”²³

²² OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4 (Sept. 17, 2003) (“CIRCULAR A-4”).

²³ Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process, 83 Fed. Reg. 27,524 (June 13, 2018).

A. EPA's Use of Incidental Benefits has Masked the True Costs and Intended Benefits of its Regulatory Decisions.

OMB Circular A-4 defines incidental or ancillary benefits as “a favorable impact of the rule that is typically unrelated or secondary to the statutory purpose of the rulemaking.”²⁴ This relatively simple definition makes clear that the incidental benefit is not an intended result of the regulation. The relevant example that Circular A-4 outlines is decreased emissions at oil refineries due to increased fuel efficiency requirements on cars and/or trucks. In practice, however, EPA has stretched the definition of “incidental” far beyond the pale of reason in its co-benefits practice.

Virtually all of the monetized benefits that EPA has ever estimated in its rulemakings come from reductions in PM_{2.5}. In fact, between 2000 and 2016, over 97% of all benefits that EPA claimed from its regulations were from PM_{2.5} reductions.²⁵

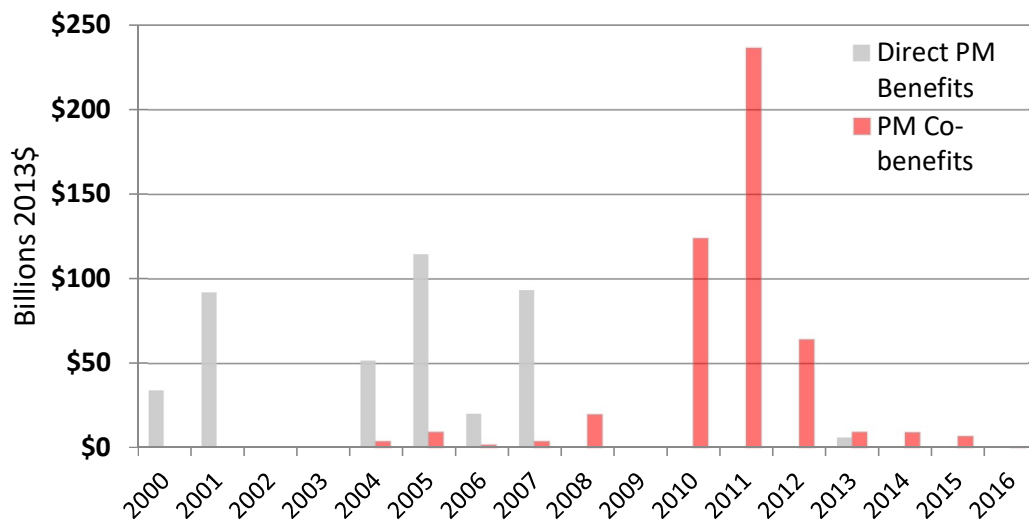
By selecting a level of regulatory stringency that is unnecessarily burdensome for control of a targeted pollutant, and justifying that choice by invoking incidental benefits that arise because of the greater level of stringency, EPA is reducing transparency. If a pollutant has a significant enough effect on health and welfare to be a high regulatory priority, it would normally be regulated directly, and EPA would be expected to be up front with the fact that it is doing so. The evidence, however, suggests that EPA has not followed this simple, common sense regulatory directive. In fact, as detailed in the chart below, even a conservative accounting of EPA's PM_{2.5} benefits claims from 2000 to 2016, giving the agency the benefit of the doubt as to whether claimed benefits are from directly regulated emissions reductions under the relevant

²⁴ CIRCULAR A-4 at 26.

²⁵ U.S. Chamber of Commerce, *Compilation from EPA Regulatory Impact Analyses (RIA)*.

authorizing statute, shows that over 53% of all claimed PM_{2.5} benefits are incidental.²⁶ Even more striking is the increase in reliance on incidental benefits during the 2009 through 2016 time period, with incidental benefits accounting for 98.6% of all claimed PM benefits over that period compared to only 8.5% of all PM benefits from 2000 through 2008.²⁷

Annual PM_{2.5} Benefits Claimed by EPA: Direct vs Incidental Benefits



Source: Compilation from EPA Regulatory Impact Analyses (RIA)

The data show that EPA has in the recent past relied almost exclusively on PM_{2.5} incidental benefits to justify regulations based on a broad range of CAA statutory provisions that have impacted a substantial number of industry sectors. These regulations were finalized and implemented with little transparency in the regulatory process because the agency relied almost exclusively on incidental benefits, not benefits from directly-regulated pollutants. This over-

²⁶ *Id.*

²⁷ *Id.*

reliance on incidental benefits to justify broad, sweeping new regulations drastically reduced the accountability of the agency and created substantial uncertainty as to whether it has been properly and judiciously pursuing its statutorily directed mission.

B. The Proposal Correctly Notes EPA’s Flawed Approach to Co-Benefits under the 2012 and Supplemental Finding and Should Use the Proposed Analysis in Prospective Rulemaking to Guide Cost-Benefit Analyses.

i. Cost-Benefit Analyses are an Important Part of Rulemaking and the Chamber Applauds EPA’s Correction of the Flawed Approach Previously Applied.

The Chamber strongly supports EPA’s recognition that cost-benefit analysis is a necessary input to a consideration of “appropriate and necessary” under the statute. Indeed, Justice Scalia’s majority opinion in *Michigan v. EPA* confirms that the instances wherein costs should *not* be considered are narrowly prescribed and rare under the CAA.²⁸ Where the statutes are silent with regard to the consideration of costs, EPA should consider costs and benefits consistent with Supreme Court decisions in *Michigan v. EPA*²⁹ and *Entergy v. Riverkeeper*.³⁰ In both decisions, the Court affirmed that the EPA should use cost-benefit analysis in standard setting within the relevant, statute-specific language. EPA should initiate rulemakings from the position of using appropriate analysis as a guiding principle, and walk back such usage thereafter only as the statute requires. Such an interpretation is consistent with E.O. 12,866, which required that significant regulatory actions be submitted for review to the Office of Information and Regulatory Affairs within the Office of Management and Budget.³¹

²⁸ 135 S. Ct. at 2,709.

²⁹ See *Michigan v. EPA*, 576 U.S. ____ (2015), 135 S. Ct. 2,699.

³⁰ *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009).

³¹ EXEC. ORDER NO. 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51,747 (Oct. 4, 1993).

EPA is correct in rejecting the Agency’s 2016 “preferred approach” to assessing cost for the appropriate and necessary decision and in asserting that this approach, labeled “cost reasonableness” by the agency in the supplemental finding, does not satisfy the obligation placed upon the agency by the court in *Michigan v. EPA*. The “cost reasonableness” standard that EPA attempted to establish makes two incorrect claims: 1) that the agency can ignore the comparison of costs to benefits in its analysis; and 2) that the agency can satisfy the requirement to assess the cost of the rule by finding, in essence, that if regulated entities can afford the regulation, then the costs are reasonable. This approach is flawed both in meeting the obligations outlined by the *Michigan* court and in meeting the basic standards for appropriate cost-benefit analysis as a tool to inform regulatory decision-making, as directed in E.O. 12,866.

Whether or not the regulated entity can “afford” the regulation, which in and of itself is a standard with multiple potential definitions and metrics, is irrelevant to determining whether or not the regulation is appropriate. EPA argued in the Supplemental Finding that this cost reasonableness approach was justified because it applied logic similar to that used in issuing new source performance standards under section 111 of the CAA. However, as EPA rightly highlights in this proposal, the decision to require retrofit of emissions controls on the entire fleet of existing facilities is vastly different than determining whether some additional marginal cost for controls on a newly constructed or renovated facility is appropriate.

Further, we also support EPA’s rebuttal of the position previously taken by EPA in its 2016 supplemental finding in response to *Michigan v. EPA* regarding its alternative approach to assessing the appropriate and necessary decision as directed by the court.³² Specifically, the

³² 81 Fed. Reg. at 24,420.

current proposal correctly notes that EPA erred in its assertion that incidental benefits should be counted equally with direct benefits from, in this case, the reduction of HAPs. While the statutory language allows for consideration of incidental benefits, those incidental benefits should not be the overwhelming majority of all identified and quantified benefits. It is again worth pointing out that incidental benefits accounted for over 99.9999% of all benefits from the MATS Rule. The ratio of incidental benefits to direct benefits from HAP reductions in this case is incommensurate with the reasonable consideration of incidental benefits otherwise permitted in OMB Circular A-4 guidance.

ii. EPA Should Establish an Analytical Framework for Cost-Benefit Analyses that Addresses the Use of Incidental Benefits

The use of incidental benefits is a serious problem that has plagued EPA's past rulemakings, reduced transparency and allowed the Agency to issue regulations that may do more harm than good. The Chamber urges EPA to prospectively address the use of incidental benefits in its upcoming rulemaking entitled "Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process" (Docket ID EPA-HQ-OA-2018-0107).

A well-designed regulation should address an identified problem in the most cost-effective means possible, reducing the targeted pollutant through the most direct, minimally burdensome means.³³ EPA should drastically reduce its use of incidental benefits to justify non-PM rules. The agency should develop regulatory guidance on how to appropriately use the benefits of indirectly regulated emissions reductions in standards-setting decisions. EPA should

³³ See EXEC. ORDER NO. 12,866, *supra* note 32, at Sec. 1(b)(5).

commit to setting standards based on the costs and benefits of directly regulated pollutants, and only then considering the ancillary benefits after the basis for regulation has been established. This ensures that co-benefits are, in fact, incidental rather than the real focus of regulatory action.

EPA should further consider only counting health benefits of indirectly regulated pollutants when reductions occur above the (National Ambient Air Quality Standard) NAAQS limit. Once EPA sets a standard for PM_{2.5} that meets the statutory requirements under the NAAQS as protective of human health and welfare with an adequate margin of safety, it should not claim that the policy generates additional benefits when indirectly regulating the pollutant under other statutes. This restriction would preserve the preference for directly regulating pollutants via the statutory provisions designed by Congress to address the specific concerns relative to those pollutants. Doing so enhances the transparency and openness of the regulatory process and ensures that the public has every opportunity to participate in a rulemaking.

III. EPA Should Finalize the Residual Risk and Technology Review for MATS

Consistent with the foregoing discussion, the Chamber encourages the EPA to focus its forthcoming final rule on the completion of the RTR included within its proposal. This mandated one-time 8-year evaluation of the remaining risks associated with and recurring 8-year evaluation of the technological effectiveness of the MATS rule is necessary to ensure regulatory certainty with respect to the 80-plus gigawatts of generation that have upgraded to achieve MATS compliance. The industry's efforts to date have resulted in a nearly 90 percent reduction in its mercury emissions over the last decade. Given the proven track record of operating these control strategies across various units and the emissions reductions they have achieved, EPA clearly has the data it needs to complete its review. Completing the RTR process now will foster certainty for long-term business planning, power markets, compliance strategies and

coordination among other regulatory requirements that the industry and economy need to assure sound investment and planning, while maintaining affordable and reliable electricity supplies.

CONCLUSION

For all these reasons, EPA should make all efforts to retain the MATS Rule, finalize the RTR, and embark on a prospective rulemaking to improve the Agency's future evaluation of costs and benefits.